NO. 04-1825

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TERRI DAVISON,

Appellant,

vs.

CITY OF LONE JACK, MISSOURI,

Appellee.

Appeal from the Judgment of the United States District Court
for the Western District of Missouri, Western Division
The Honorable Scott O. Wright

BRIEF OF APPELLANT

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This appeal follows the grant of the City's motion for summary judgment by the Honorable Scott O. Wright, U.S. Judge for the Western District of the United States District Court for the Western Division of Missouri. Davison claimed that she was deprived of her right to equal protection of the law by being discriminated against on the basis of her sex in violation of 42 U.S.C. §1983. Appellant respectfully requests twenty (20) minutes be set aside for oral argument.

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JURISDICTIONAL STATEMENT

This appeal is made from the grant of the appellee's motion for summary judgment by the Honorable Scott O. Wright on March 12, 2004. The Notice of Appeal was timely filed on March 12, 2004. Davison Separate Appendix 001 (hereinafter DSA). Jurisdiction in the federal courts is proper pursuant to 28 U.S.C. §1331 as the 42 U.S.C. §1983 claims arose under the statutes of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. §1291 from a final Order. Venue is proper under 28 U.S.C. §1391(b) because the claims arose in the Western District of Missouri.

STATEMENT OF ISSUES

WHETHER THERE IS SUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT DEFENDANTS SEXUALLY HARASSED DAVISON IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

Moring v. Arkansas Dept. of Corrections, 243 F.3d 452 (8th Cir. 2001)
Van Steen burgh v. The Rival Company, 171 F.3d 1155 (8th Cir. 1999)
Ocheltree v. Scollon Products, 335 F.3d 325 (4th Cir.2003 en banc)
Harris v. City of Pagedale, 821 F.2d, 499 (8th Cir. 1987)

WHETHER THERE IS SUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT DEFENDANT CONSTRUCTIVELY DISCHARGED DAVISON.

Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568 (8th Cir. 1997)
Jaros v. Lodgenet Entertainment Corp., 294 F.3d 960 (8th Cir. 2002)

STATEMENT OF THE CASE

This case was brought by former City of lone Jack employee, Terri Davison, against the defendant City of Lone Jack and officers Jeff Jewell, Derrick Ross, Steve Berry, and Steve King seeking damages for alleged violations of 42 U.S.C. §1983. (DSA 13-21, Plaintiff's Complaint). Plaintiff and defendant King filed a stipulation of dismissal with prejudice on June 15, 2003. (DSA 6, District Court Docket Sheet). Plaintiff and defendants King, Berry, and Jewell filed a stipulation of dismissal with prejudice on January 8, 2004. (DSA 10, District Court Docket Sheet). The defendant filed a motion for summary judgment with regard to Plaintiff's claims. (DSA 32-50). On March 12, 2004 the District Court issued its Order finding that appellee was entitled to summary judgment. (DSA 379-384). On March 17, 2004, appellant filed a motion for reconsideration. (DSA 386-394). On March 24, 2004, the District Court denied the motion for reconsideration. (DSA 395).

On March 25, 2004, appellant filed a Notice of Appeal. (DSA 001).

STATEMENT OF FACTS

Davison's Employment With the City

Terri Davison became employed with the City of Lone Jack, Missouri as a City Clerk in June 2000. (DSA 108, Davison Deposition, p.34). Ms. Davison was first employed by the City of Lone Jack as an Office Manager. As Office Manager, Ms. Davison had supervision over the police department. This position was eventually taken away from her by the City Board against the advice of City Attorney, Michael Gatrost. (DSA 161, Gatrost Deposition, p.p. 5-7). Members of the police department, in particular Police Chief Jeff Jewell, did not want Ms. Davison coordinating scheduling. Jewell simply did not want any supervision by her. There was "significant resistance" to Ms. Davison's attempts to comply with her duties as office manager by the police department. (DSA 161, Id., p.p. 5-8). Jeff Jewell went to every member of the City Council's home to state that he did not like Ms. Davison having supervision over him. At the first city council meeting, Ms. Davison was stripped of supervision of Jewell. (DSA, 123, Davison Deposition, p.93)

On July 19, 2000, Davison resigned from her employment with the City because of the offensive conduct at the workplace by the police officers with whom she worked. Davison resigned from Lone Jack because of the vulgarity and profanity she was subjected to on a daily basis. She told the City Council that "I

was not going to be treated differently because I was a woman, I was not going to be treated badly, I was not going to sit there and listen to cunt, bitch, and whore, all day. I just couldn't do it." (DSA 145, Davison Deposition, p.p. 183-184).

The City Hierarchy

The City had a Board of Alderman and Mayor. The mayor chaired the Board of Alderman. (DSA 168, Gatrost Deposition, p. 35)

Offensive Conduct at the Workplace

Chief Jewell said he "fucked so many bitches" he does not know how many kids he has. (DSA 136, Davison Deposition, p.147; DSA 178, Davison Deposition Exhibit 1). Officer Ross commented at the workplace that Jewell "loves blow jobs and so and so gives good head." (DSA 136-37, Davison Deposition, p.p. 148-149; DSA 178, Davison Deposition Exhibit 1). Officer Ross said that Jewell "fucked" Angela Smith and Tammy Ross on his desk in his office. (DSA 137, Davison Deposition, p.p.149-150; DSA 178, Davison Deposition Exhibit 1).

Officers Ross and Berry talked about meeting women at a storage facility for blow jobs. (DSA 137, Davison Deposition, p.151-152; DSA 178, Davison Deposition Exhibit 1). Ross said that Jewell "fucked" almost every "bitch" in town and the City needed new residents. (DSA 137, Davison Deposition, p.152; DSA 178, Davison Deposition Exhibit 1).

Ms. Davison was followed home by a Lone Jack Police Cruiser though she lives outside of Lone Jack. She told Attorney Gatrost and Mayor Nipper that this bothered her. They told her they were sure it was an attempt at intimidation. (DSA 138-39, Davison Deposition, p.155-159; DSA 178, Davison Deposition Exhibit 1).

In July 2000, Jeff Jewell, then Police Chief, told Ms. Davison to keep her mouth shut or she would disappear or something would be placed into her car. (DSA 117, Davison Deposition, p.p. 70-72). Officer Ross directly said to Ms. Davison that if "the Standiford boy had not been out with that stupid cunt the night before, he would still be alive." Officer Ross also said "Chritina Moses was a "town whore" and "everybody had a ride." (DSA 120, Davison Deposition, p.83-84)

The officers used offensive language degrading women on a daily basis outside her door. Ms. Davison believes that the officers were speaking in a loud tone intending for her to hear them. (DSA 121, Davison Deposition, p.p.85-86). "They were pretty much derogatory and thought all women were cunts, bitches, or whores and second-class citizens." Mr. Jewell questioned during an unrelated lawsuit why he got "that stupid bitch cunt lawyer. Why didn't we get the man." As Ms. Davison testified, "any woman in any capacity to them was not the same as

a man, they were lower, they are lower-class citizens." (DSA 132-33, Davison Deposition, p.p. 132-133).

Jeff Jewell went to every member of the City Council's home to state that he did not like Ms. Davison having supervision over him. At the first city council meeting, Ms. Davison was stripped of supervision of Jewell. (DSA 123, Davison Deposition, p.93). Members of the police department, in particular Police Chief Jeff Jewell, did not want Ms. Davison coordinating scheduling. Jewell simply did not want any supervision by her. There was "significant resistance" to Ms. Davison's attempts to comply with her duties as office manager by the police department. (DSA 161, Id., p.p. 5-8). At the first city council meeting, Ms. Davison was stripped of supervision of Jewell. (DSA, 123, Davison Deposition, p.93)

Officer Berry overheard Jewell talking about sexual relations. (DSA 182, Berry Deposition, p.p. 13-14). He participated in conversations with Jewell about sexual activity. (Id., p. 15, lines 21-25). For example, they discussed women's breast sizes, specifically, the breast size of the women with whom Jewell had sex. (Id., p. 15). The conversations about sex took place in Jewell's office, or perhaps in the Officer's Room, located next to it. (Id., p. 15-16). There was no door on the officer's room. (Id., p. 16).

At the office, Officer King heard jokes about how many children Jewell had fathered, and heard Jewell himself talk about his sexual exploits. (DSA 190, Stephen E. King Deposition, p. 18, lines 15-23). These comments occurred in Jewell's office. King also heard “rumors” from talking with residents at the local gas station and the café that Jewell was having sex with women in his office. (Id. p. 19, line 19-25 to p. 20, lines 1-9). Local residents would literally walk up to him, and state that they heard about sexual activity in the police station. (Id.).

Detective Goodner told then Mayor Hensel there was "quite a bit of crude talk going on in the Police Department." (DSA 213, Goodner statement under oath, p. 22, line 21, to p. 23, line 1). In particular, he complained to Hensel about Officers Jewell, Ross and Berry. (DSA 214, Id., p. 29). Hensel's response was -- "**guys will be guys.**" (DSA 213, Id., p. 23). Hensel saw to it that Jewell could run the Police Department "any way that he wanted." (DSA 214, Id., p. 28-29).

Jewell would sometimes bring his girlfriend into his office, and close his door, and Detective Goodner could hear sounds of sexual activity outside his office. (DSA 214, Goodner Statement, p. 26, lines 6-18). Ms. Davison overheard sounds of what she thought were Chief of Police Jewell and Angela Smith engaging in sexual acts in his office. This was reported to Mayor Nipper. (DSA 131, Davison Deposition, p.p.126-127)

Ms. Davison was provided a photograph in the summer of 2002 of Officer Jewell receiving a blow job while in a police uniform. Mr. Jewell always talked about "blow jobs." (DSA 129, Davison Deposition, p.p.117-120; DSA 219, Jewell Deposition Exhibit 2). Chief Jewell told Detective Goodner about a photograph of Jewell in which he was having oral sex performed on him by a woman. (DSA 211, Statement of Thomas Goodner, p. 15, lines 10-14). Jewell admitted that he was photographed receiving oral sex, while employed by the City of Greenwood, wearing his police pants. (DSA 221, Jewell Deposition, p. 4, lines 21-25, to p. 5, line 1-4).

The officers talked explicitly about some photograph taken from a car depicting a woman and a dildo. (DSA 129, Davison Deposition, p.p.119-120). Officer Ross and Chief Jewell removed a pornographic picture from a car they had stopped for a traffic violation, and circulated it throughout the police department. (DSA 212, Statement of Thomas Goodner, p. 18, line 15 to p. 19, line 4). The photo showed a woman, who was bent over, with a table leg sticking out of her rectum or vagina. (DSA 212, Id., p. 18, lines 19-20). Ross admitted that he brought the photograph of a woman inserting something into her vagina back to the police station. (DSA 291-92, Ross deposition, pp. 29-30). He brought it back to the station, and showed it to one officer, and claimed that he threw it in the trash. (DSA 292, Id., p. 30). Jewell admitted that Officers Ross and Berry brought

the pornographic photo back to the station, and showed it to Detective Goodner. (Exhibit I, Jewell deposition, p. 7-13).

The City's Sexual Harassment Policy

Prior to June 20, 2000, the City did not have a sexual harassment policy. (DSA 354, Doney Deposition, p 43). The City formally adopted a Policy prohibiting sexual harassment on June 20, 2000 at a City Council Hearing. Prior to June 2000, there was an attempt to implement a sexual harassment policy because of complaints by a former clerk, Debbie Brewington. (DSA 165, Gatrost Deposition, p.p.21-22; DSA 300-05, Gatrost Deposition Exhibit 2). The sexual harassment policy was adopted for city employees and members of the police department. (DSA 310, Reinking Deposition, p.8).

The City's sexual policy against sexual harassment was distributed in July 2000 but not all employees signed it. (DSA 164, Gatrost Deposition, p.17). Ms. Davison attempted to distribute sexual harassment policies and she couldn't get them signed and returned by the police department. The sexual harassment policy was found in the trash can. (DSA 161, Gatrost Deposition, p.7; DSA 306-08, Gatrost Notes).

On July 12, 2000, the City distributed a memo to all city employees indicating that they were required to acknowledge receipt of the City's sexual harassment policy. (DSA 313, Reinking Deposition, p.19; DSA 333, Reinking

Deposition Exhibit 5). On December 8, 2000, Officer Derrick Ross signed the acknowledgement indicating receipt of the City's sexual harassment policy. (DSA 314, Reinking Deposition, p.p.23-24; DSA 334, Reinking Deposition Exhibit 8). On March 4, 2002, Officer Jeff Jewell signed the acknowledgement indicating receipt of the City's sexual harassment policy. (DSA 314, Reinking Deposition; DSA 335, Reinking Deposition Exhibit 6).

City's Knowledge of Conduct

Michael Gatrost was employed by the City of Lone Jack as a City Attorney from 1998 to 2001. (DSA Gatrost Deposition, Attached as Exhibit B, p.p.4-5). Ms. Davison complained to Michael Gatrost at least 20 times regarding her treatment at the workplace. She complained to him at City council or special meetings and over the telephone. She complained to Gatrost about being threatened, the vulgar language being used such as cunt, slut, bitch, whore, cock, terms the officers referred to women. (DSA 116, Davison Deposition, p.66). Ms. Davison expressed on several occasions to Mr. Gatrost that she was experiencing resistance from the police department in her position as Office Manager. (DSA 161, Gatrost Deposition, p.8).

Ms. Davison complained to Mr. Gatrost that some of the police officers referred to women as cunts, sluts, whores, and bitches. (DSA 161-62, Gatrost Deposition, p.p.9-10; DSA, 298-99, Gatrost Deposition Exhibit 1). Ms. Davison

also complained to Mr. Gatrost that she was subjected to an atmosphere in which Police Chief Jewell would comment about his sexual exploits. Ms. Davison would call Gatrost at least once or twice a day about the problems she was experiencing at Lone Jack. (DSA 162, Gatrost Deposition, p.11-12). Ms. Davison complained about language used by the officers at the workplace in describing woman as cunts, sluts, whores, and bitches on numerous times, at least 10. (DSA 162, Gatrost Deposition, p.p.11-12). Ms. Davison expressed to Mr. Gatrost that her work environment was beyond intimidation and harassment on a regular basis. (DSA 169, Gatrost Deposition, p.p.37-38)

Mr. Gatrost referred these complaints to the Mayor John Nipper. Ms. Davison complained to Mayor Nipper 10-15 times regarding the offensive behavior. (DSA 118, Davison Deposition, p.75). Ms. Davison's complaints and problems were brought to the City Council. Every person on the Board of Alderman knew about Ms. Davison's problems and the use of sexual and vulgar language being used in City Hall. (DSA 162-63, Gatrost Deposition, p.p.12-15)

When Ms. Davison complained about the use of language at the workplace, Mr. Gatrost believed Ms. Davison to be complaining about sexual harassment. Mr. Gatrost also understood Ms. Davison to being intimidated. (DSA 164, Gatrost Deposition, p.p.19-20). Mr. Gatrost took notes of some of the conversations that

he had with Ms. Davison regarding her complaints. (DSA 166, Gatrost Deposition, p.p.26-28; DSA 306-08).

The City's Response to the Complaints

Mr. Gatrost indicated to the City Council that a sexual harassment policy was required because of the complaints forwarded to him by Debbie Brewington, the former City Clerk. (DSA 347-48, Doney Deposition, p.p. 15-17). There was a feeling that nothing could be done to remedy the complaints of Ms. Davison. The problems would generally be solved by the employee quitting and the City hiring someone who was not offended by the conduct. (DSA 169, Gatrost Deposition, p.p.38-39). The Board of Alderman and the Mayor were aware of Ms. Davison's concerns and complaints. (DSA 169, Gatrost Deposition, p.p.40). Though the City had a duty to investigate Ms. Davison's complaints and both Mr. Gatrost and the Mayor believed that Ms. Davison was credible and that officers Jewell, Ross, and Berry had referred to women as cunts, sluts, whores, and bitches because "there was just too much that was bombarding us on almost a daily basis", no investigation was undertaken. (DSA 170, Gatrost Deposition, p.p.42-43)

The City did nothing with regard to remedying the concerns of Ms. Davison. It never investigated her concerns though the City had prior similar complaints from a former City Clerk. The Board of Alderman did not investigate the concerns and simply had an attitude "this is the way it is." (DSA 171, Gatrost

Deposition, p.p.46-47). Gatrost characterizes the alleged conduct of the officers as "persistent" and admits that the City had "no mechanism" with which to address the problems of Ms. Davison. (DSA 171, Gatrost Deposition, p.p.47-48). Reinking is unaware of any investigation taken by the City into the complaints of Ms. Davison regarding sexual harassment. (DSA 317, Reinking Deposition, p.p.33)

SUMMARY OF ARGUMENT

Summary judgment should not have been entered in favor of the Defendant. Davison presented evidence sufficient to establish issues of fact as to violations of 42 U.S.C. §1983 with regard to her claims. There existed issues of fact that Davison was subjected to a hostile work environment because of her sex and was constructively discharged.

ARGUMENT

I. APPLICABLE STANDARD OF REVIEW

The appellate court reviews a district court's decision with regard to summary judgment *de novo. Lang v. Star Herald,* 107 F.3d 1308, 1311 (8th Cir. 1997), *Jetton v. McDonnell Douglas Corp.*, 121 F.3d 423, 424 (8th Cir. 1997).

The question before the district court was whether the record, *when viewed in the light most favorable to the non-moving party,* showed that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. *Fed.R.Civ.P. 56(c); Celotex Corp.* v. *Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, *2552-53,* 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986); *Mullins v. Tyson Foods, Inc.,* 143 F.3d 1153 (8th Cir.1998)(reversing summary judgment where genuine issues of material fact existed in the record).

The courts in this judicial circuit have consistently ruled that, in reviewing a summary judgment motion, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. See *Inland Oil and Transport Co. v. United States,* 600 F.2d 725, 727-28 (8th Cir.), cert denied, 444 U.S. 991, 100 S.Ct. 522, 62 L.Ed. 2d 420 (1979); *Adickes v. S.H. Kress & Co.,* 398

U.S. 144, 157, 90 5. Ct. *1598,* 1608, 26 L.Ed. 2d 142 (1970).

The moving party bears the initial burden of demonstrating by reference to portions of pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, *the absence of genuine issues effect.* See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. *2505,* 2510, 91 L.Ed. 2d 202 (1986). The non-moving party is then required to go beyond the pleadings and by affidavits, depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Id.* A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.*

"The ultimate burden of proof is on the movant, here the defendant, to establish that there are no material facts in dispute and that, as a matter of law, the movant is entitled to judgment." *Oldham v. West,* 47 F.3d 985, 988 (8th Cir. 1995). The facts "and possible inferences from those facts" must be viewed in the light most favorable to the non-moving party, here plaintiff. *Id.* "Summary judgment is appropriate only in those rare instances where there is no dispute of fact and where there exists only one conclusion." *Id.* This Court "must apply the same strict standard as the district court," which means: 'We may neither weigh evidence nor make credibility deteirninations at the summary judgment stage." *Grossman v. Dillard Department Store, Inc.*, 47 F.3d 969, 971 (8th Cir. 1995).

Defendant below failed in its obligation to present all relevant parts of the available discovery record in its most plaintiff-favorable light and, "negate, if he can, the claimed basis of the suit" *Celotex Corporation v. Catrett,* 477 U.S. 317, 106 5. Ct. 2548, *2555* (1986). Where, as here, defendant does not address and negate all of the evidence and inferences favoring plaintiff it fails to discharge its burden under Rule 56:

> But the movant must discharge the burden the rules place upon him: It is not enough to move for judgment... with a conclusory assertion that the plaintiff has no evidence to prove his case. *Id.,* 106 S.Ct. at *2555.*

Credibility determinations, weighing the evidence, and drawing legitimate inferences from the facts are jury functions, not those of the judge. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 2513 (1986). *Anderson* holds that summary judgment review "mirrors the standard for a directed verdict.…"*Id.* See also *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S.133, 120 S.Ct 2097 (2000) (reaffirming that Rule 50 and Rule *56* standards "mirror" each other). Thus, Defendant's evidence must be ignored — unless it helps plaintiff. *Morgan v. Arkansas Gazette,* 897 F.2d 945, 948 (8th Cir. 1990). Summary judgment requires "all the evidence must point one way and be susceptible of no reasonable inferences" for plaintiff. *Hardin v. Hussmann Corp.,* 45 F.3d 262, 264(8th Cir. 1995). Plaintiff need only show a single genuine dispute of material fact, or an inference in her favor from undisputed facts, from which a jury "might return a

verdict in their favor." *Anderson,* 106 S.Ct. at 2514.

At the summary judgment stage, the court may not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter. *Quick v. Donaldson Company, Inc.*, 90 F.3d 1372, 1376 (8th Cir. 1996). The Eighth Circuit Court of Appeals has repeatedly cautioned that summary judgment should seldom be granted in the context of employment actions, as such actions are inherently fact based. *Hindman v. Transkrit Corp.*, 145 F.3d 986, 990 (8th Cir. 1998); *cf. Smith v. City of St. Louis*, 109 F.3d 1261,1264 (8th Cir. 1997); *see Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir.1994) (explaining that "[b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant").

In a sexual harassment case, once there is evidence of improper conduct and subjective offense, the question of whether the conduct rose to a persuasive level of abuse is largely one for the jury. *See Howard v. Burns Bros., Inc.*, 149 F.3d 835, 840 (8th Cir.1998). Furthermore, whether a work environment is objectively hostile or abusive is a fact-intensive inquiry. *Bales v. Wal-Mart Stores, Inc.,* 143 F.3d 1103, 1109 (8th Cir.1998).

II. MS. DAVISON WAS SUBJECTED TO SEXUAL HARASSMENT WHICH CREATED A HOSTILE WORK ENVIRONMENT.

A. Introduction.

In *Moring v. Arkansas Dept. of Corrections*, 243 F.3d 452 (8th Cir. 2001), the court held that intentional sexual harassment by persons acting under color of state law violates equal protection, and is actionable under 42 U.S.C. §1983. *Id*. at 455. The court analyzed the §1983 claim under the same standards as Title VII, holding that factual issues precluded summary judgment. *Id.*, at 455-56.

Mrs. Davison may establish a violation . . .by proving that discrimination based on sex has created a hostile or abusive work environment. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986). "For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [Mrs. Davison's] employment and create an abusive working environment." *Id.* at 67 (citation omitted). A party claiming sexual harassment must show both that the offending conduct created an objectively hostile environment and that she subjectively perceived her working conditions as abusive. See *Rorie v. United Parcel Service, Inc.*, 151 F.3d 757, 761 (8th Cir. 1998); *Hathaway v. Runyon*, 132 F.3d 1214, 1221 (8th Cir. 1997).

Determining whether an actionable hostile environment claim exists requires an examination of all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes

with an employee's work performance. *National Railroad Passenger Corp. v. Morgan*, 122 S.Ct. 2061, 2067 (2002); *quoting Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23, 114 S.Ct. at 367. In addition, in cases involving non-supervisory level employees, a plaintiff is also required to show that an employer knew or should have known of the harassment and failed to take proper remedial action. *See Callahan v. Runyun*, 75 F.3d 1293, 1296 (8th Cir. 1996). Finally, as Justice Scalia has stated, "We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998, 1003 (1998).

Assuming all of Mrs. Davison's evidence to be true, giving her the benefit of all reasonable inferences, and resolving all conflicting evidence in her favor, it is clear that she has presented sufficient evidence to establish a jury question with respect to the severity and pervasiveness of the sexual harassment she experienced at the City of Lone Jack.

B. <u>The Harassment Was Severe or Pervasive</u>.

As the facts demonstrate any such suggestion that this was neither severe nor pervasive is meritless. The alleged misconduct was clearly pervasive. Indeed, the District Court did not appear to suggest otherwise. As Mrs. Davison testified, The officers used offensive language degrading women on a **<u>daily</u>** basis outside

her door. Ms. Davison believes that the officers were speaking in a loud tone **intending** for her to hear them. (DSA 121, Davison Deposition, p.p.85-86). "They were pretty much derogatory and thought all women were cunts, bitches, or whores and second-class citizens." Mr. Jewell questioned during an unrelated lawsuit why he got "that stupid bitch cunt lawyer. Why didn't we get the man." "[A]ny woman in any capacity to them was not the same as a man, they were lower, they are lower-class citizens." (DSA 132-33, Davison Deposition, p.p. 132-133).

Moreover, the conduct was severe. Again, the District Court did not seem to suggest otherwise. Further, the severity of defendant's sexual banter was magnified because it occurred in the small offices of the Lone Jack city hall, where Mrs. Davison could easily overhear comments made in the common area, and the police department's offices. *See Hathaway, supra,* 132 F.3d at 1222 (assignment to work in close proximity to harassers is significant factor in totality of circumstances inquiry).

C. The Harassment was Because of Sex

The District Court concluded that Mrs. Davison could not demonstrate that the offensive conduct at issue in this case was because of her sex because it would have occurred regardless of whether she was male or female. As the Court contended, "plaintiff has admitted the she has no idea the alleged offensive language…was spoken because of her gender." (DSA 381, Order, p.3). This statement neglects the following testimony however:

> "They were pretty much derogatory and thought all women were cunts, bitches, or whores and second-class citizens." Mr. Jewell questioned during an unrelated lawsuit why he got "that stupid bitch cunt lawyer. Why didn't we get the man." As Ms. Davison testified, "any woman in any capacity to them was not the same as a man, they were lower, they are lower-class citizens." (DSA 132-33, Davison Deposition, p.p. 132-133).

At the summary judgment stage, a plaintiff may prove harassment is "based on sex" by presenting evidence that members of one sex were the primary targets of harassment. *Quick,* 90 F.3d at 1378 (evidence that members of one sex were primary targets of harassment sufficient to show conduct was gender based for purposes of summary judgment) (quoting *Kopp,* 13 F.3d at 269-70). Whether harassing conduct is based on sex is determined by inquiring "whether 'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.' " *Quick,* 90 F.3d at 1379 (quoting *Harris,* 510 U.S. at 25, 114 S.Ct. 367) (Ginsburg, J., concurring).

As the Court in *Fry v. Holmes Freight Lines, Inc.*, 72 F.Supp.2d 1074, 1078-79 (W.D.Mo. 1999) shrewdly observed:

> Because a harasser's motive is normally proven through inferences rather than direct evidence, summary judgment is generally not appropriate. *See Davis v. Fleming Cos.*, 55 F.3d 1369, 1371 (8th Cir.1995)…"the court's role on summary judgment is not to find facts or to construe inferences in favor of a moving party." *Carter,* 173 F.3d at 701.

As the court is aware, it is axiomatic that incidents of sexual harassment need not be explicitly sexual. *See Van Steen burgh v. The Rival Company,* 171 F.3d 1155, 1159 (8th Cir. 1999). (citing cases). Indeed, "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998). In *Burns v. McGregor Elec. Indus., Inc.,* 989 F.2d 959, 964-65 (8th Cir.1993), the court concluded that "vulgar and offensive" words " 'are widely recognized as not only improper, but as intensely degrading' " and thus frequent use of such words "clearly violates Title VII" (*quoting Katz v. Dole,* 709 F.2d 251, 254 (4th Cir.1983)).

"A plaintiff…need not show, moreover, that only women were subjected to harassment, so long as she shows that women were the primary target of harassment." *Beard v. Flying J, Inc.,* 266 F.3d 792, 798 (*citing Quick, supra,* 1378.) "Evidence that members of one sex were the primary targets of the harassment is sufficient to show that the conduct was gender based for purposes of

summary judgment." *Ellet v. Big Red Keno, Inc.,* 1998 WL 476106 (D.Neb.) (*citing Kopp v. Samaritan Health Systems, Inc.,* 13 F.3d 261 (8th Cir.1993).

Courts have recognized that harassing conduct can be "because of sex" even when the conduct "is not directed at a particular individual or group of individuals, but is disproportionately more offensive or demeaning to one sex." *Robinson v. Jacksonville Shipyards, Inc.,* 760 F.Supp. 1486, 1522-23 (M.D.Fla.1991). *See also Andrews v. City of Philadelphia,* 895 F.2d 1469, 1486 (3d Cir.1990) (stating that "we do not consider it an unfair burden of an employer of both genders to take measures to prevent an atmosphere of sexism ... [from pervading] the workplace"). This category of sex-based harassment "describes behavior that creates a barrier to the progress of women in the workplace because it conveys the message that they do not belong, that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment. That Title VII outlaws such conduct is beyond perad-venture." *Robinson,* 760 F.Supp. at 1523.

In *Robinson* the court held that a workplace plastered with pictures of nude and partially nude women (often in sexually submissive postures) was a hostile environment even though the posting of the pictures "did not originate with the intent of offending women in the workplace (because no women worked in the jobs when the behavior began)." *Id.* It was enough that the pictures had a

"disproportionately demeaning impact on the women now working" in the same environment. *Id.*

Further, “There is a world of difference between the use of the infrequent swear word in the workplace, not actionable when not directed to a specific gender, and direct words demeaning to women in general.” *Hocevar v. Purdue Frederick Company,* 223 F.3d 721, 730 (LAY, Dissenting). “It is one thing that an employee use vulgarity in his or her general communication; it is quite another when the vulgarity is directed at a specific social group who reasonably could find it to be demeaning to their own self-being.” *Id.*

The District Court also concluded that because none of the language was directed at Davison, there could be no inference that she was discriminated against on the basis of sex. This argument was rejected in *Vinson v. Taylor,* 753 F.2d 141, 146 (D.C.Cir.1985), which expressly held that "[e]ven a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an *atmosphere* in which such harassment was pervasive." *Id.* (emphasis added). Moreover, Title VII provides employees the "right to work in an *environment* free from discriminatory intimidation, ridicule, and insult." *Meritor,* 477 U.S. at 65, 106 S.Ct. 2399 (emphasis added). The EEOC Guidelines defining sexual harassment do not limit sexual harassment to only those actions that are directed at the plaintiff. *See* 29 C.F.R. § 1604.11 (1999) ("Unwelcome sexual

advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when ... such conduct has the purpose or effect of unreasonably interfering with an individual's work performance *or creating an intimidating, hostile, or offensive working environment.*") (emphasis added).

The argument also neglects a long line of 8th Circuit cases rejecting such a requirement. *See Breeding v. Arthur J. Gallagher and Co.,* 164 F.3d 1151, 1156 (8th Cir. 1999) (considering supervisor's fondling of genitals in view of various employees, including plaintiff, and inappropriate comments made in front of men and women); *Howard,* 149 F.3d at 838 (considering harassment of employees other than plaintiff relevant to show pervasiveness of hostile environment); *Kopp,* 13 F.3d at 270 (reversing grant of summary judgment where male physician used gender-specific foul language in front of numerous employees, both male and female, only one incident of which was directed at plaintiff); *Jackson v. Quanex Corp.,* 191 F.3d 647, 660 (6th Cir.1999) (stating that "offensive comments need not be directed at a plaintiff in order to constitute conduct violating Title VII"); *O'Shea v. Yellow Technology Services, Inc.,* 185 F.3d 1093 (10th Cir. 1999)("Even though these statements may not have been directed specifically at Plaintiff…we think a jury readily could find that they were based on gender or sexual animus.")

In *Ocheltree v. Scollon Products*, 335 F.3d 325 (4th Cir.2003 en banc), the Fourth Circuit granted review to determine whether the trial court correctly denied defendant's judgment as a matter of law on plaintiff's sex-based harassment claim after a jury verdict in favor of plaintiff.

As here, the facts showed that Ocheltree's workplace was filled with coarse sexual talk and sexual antics perpetrated by several of the men. This misconduct worsened as time went on, especially after Ocheltree complained to the men and the shop supervisor. Ocheltree's co-workers constantly discussed their "sexual exploits" and talked about sexual experiences of the night before. There were times that the talk became so out of hand that Ocheltree would get up and leave the work area.

In a 9-3 vote, the majority concluded that the jury verdict in favor of plaintiff that the harassment was based on sex is "easily sustained", despite defendant's argument that the offensive conduct could be heard by both men and women and was equally offensive to men in the workplace. As the Court pointed out, "Much of the conduct…was particularly offensive to women and was intended to provoke Ocheltree's reaction as a woman." Further, also as in this case, the production- shop talk "portrayed women as sexually subordinate to men." *Ocheltre*, at 332. This Court should be as progressive.

A reasonable jury could find that Mrs. Davison was the individual target of harassment because of her sex. Moreover, a jury could find that the men in the production shop "harassed [Davison] in such sex-specific and derogatory terms ... as to make it clear that [they were] motivated by general hostility to the presence of [a] wom[a]n in the workplace." *Oncale*, 523 U.S. at 80, 118 S.Ct. 998.

This hostility is not only demonstrated by the incendiary misogynistic language used to describe women but also the officers' refusal to report to Mrs. Davison. Jeff Jewell went to every member of the City Council's home to state that he did not like Ms. Davison having supervision over him. At the first city council meeting, Ms. Davison was stripped of supervision of Jewell. (DSA 123, Davison Deposition, p.93). Members of the police department, in particular Police Chief Jeff Jewell, did not want Ms. Davison coordinating scheduling. Jewell simply did not want any supervision by her. There was "significant resistance" to Ms. Davison's attempts to comply with her duties as office manager by the police department. (DSA 161, Id., p.p. 5-8). At the first city council meeting, Ms. Davison was stripped of supervision of Jewell. (DSA, 123, Davison Deposition, p.93)

Here, the officers joined in the daily sexual conversations with police Chief Jewell, regularly referring to women as cunts, sluts, whores, and bitches. They

objectified and demeaned women, particularly Mrs. Davison, in engaging in this conduct.

These facts are similar to *Blackmon v. Pinkerton Security & Investigative Serv*., 182 F.3d 629 (8th Cir. 1999), in which the plaintiff was exposed to constant, graphic sexual conversations by her co-workers.

> For example, they used lurid language to comment on the body parts of women entering the Plant and described sex acts they would like to perform on such women, they graphically described both their sexual conquests and fantasies to each other, and they constantly and repeatedly used vulgar language to refer to sex acts and the female anatomy.

Id. at 631. Citing the co-workers' "incessant sexually explicit comments", the court held that the evidence was also sufficient to support a verdict for punitive damages. *Id.* at 637; *see also Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2281 (1998) (within earshot of the female lifeguards, harasser made frequent, vulgar references to women and sexual matters).

The District Court cites *Brewington v. City of Lone Jack, et al,* 02-0125-GAF (March 2003) and its subsequent 8th Circuit unpublished Order affirming Judge Fenner as instructive. See *Brewington v. City of Lone Jack, et al.,* 83 Fed.Appx. 856 (8th Cir.2003). This argument must fail as the primary basis for Judge Fenner's dismissal, i.e., that the alleged conduct was not "because of sex" was not addressed by the one page unpublished Order of the 8th Circuit. The 8th Circuit held the conduct was neither severe nor pervasive, and in doing failed to

even identify what language it considered in rendering its opinion, other than commenting that "She asserts that throughout her employment with the City of Lone Jack, police chief Jeffrey Jewell and officers Steven Berry and Derrick Ross made lewd and offensive statements about women in her presence on a daily basis." *Brewington*, at 857. The panel did not identify what language it considered in reaching its decision. Did the panel, like Judge Fenner in his District Court Order and argued by the defendants on appeal, disregard the declaration of Ms. Brewington in which she stated the officers' use of the words cunt, bitch, and whore? Certainly this Court will not condone the type of conduct at issue in this case which must be judged by the facts in this case.

Further, the content of the alleged statements show they were based on sex. As the court stated in *O'Shea v. Yellow Technology Services, Inc.*, 185 F.3d 1093 (10th Cir. 1999):

> Even though these statements may not have been directed specifically at Plaintiff, they nonetheless "have gender- related implications[ ][and] we cannot, with straight faces, say that [this conduct] had nothing to do with gender." (citation omitted). Because of the overtly sexual nature of these incidents, we think a jury readily could find that they were based on gender or sexual animus.

Id. at 1099.

Although Mrs. Davison did not see the pornographic photograph of Jewell or the one of the woman taken from the traffic stop, it is nonetheless relevant to

prove that the alleged conduct was "because of sex." *See Hurley v. Atlantic City Police Dept.* 174 F.3d 95 (3rd Cir. 1999). In that case, the court stated:

> Evidence of other acts of harassment is extremely probative as to whether the harassment was sexually discriminatory and whether the ACPD knew or should have known that sexual harassment was occurring despite the formal existence of an anti-harassment policy. *See West v. Philadelphia Elec. Co.*, 45 F.3d 744, 752 (3d Cir.1995). Neither of these questions depends on the plaintiff's knowledge of incidents; instead, they go to the motive behind the harassment, which may help the jury interpret otherwise ambiguous acts, and to the employer's liability.

Id. at 111. Does it not reveal the motivation behind Jewell's behavior that he openly comments why he got "that stupid bitch cunt lawyer. Why didn't we get the man." As Ms. Davison testified, "any woman in any capacity to them was not the same as a man, they were lower, they are lower-class citizens." (Davison Deposition, p.p. 132-133).

Taken together, Mrs. Davison's evidence is more than sufficient to support a finding of a hostile work environment. S*ee White v. New Hampshire Dept. of Corrections,* 221 F.3d 254, 260-61 (1st Cir. 2000) (finding a hostile work environment where, inter alia, "disgusting comments" and conversations occurred "everyday"). The severity and pervasiveness of the alleged harassment should therefore be determined by a jury.

It is undisputed that the City took no remedial action of any kind, i.e., no discipline was administered to Jewell or the other defendant officers. Factors that

are relevant in assessing the reasonableness of remedial measures include the amount of time that elapsed between the notice and remedial action, the options available to the employer, possibly including employee training sessions, transferring the harassers, written warnings, reprimands in personnel files, or termination, and whether or not the measures ended the harassment. *See Carter v. Chrysler Corp*., 173 F.3d at 702 (citing cases). Here, defendant took no action: no verbal reprimands, no written warnings, no training, and certainly no terminations. Thus, Defendant's response was not only inadequate, it was non-existent.

Mrs. Davison simply endured abuse while the Mayor and the city council stuck their heads in the sand and ignored the problem. Such evidence is sufficient not only to show negligence, but demonstrates reckless indifference. *See Howard v. Burns Bros., Inc.*, 149 F.3d 835, 844 (8th Cir. 1998) (noting that years of complaints was sufficient to demonstrate reckless indifference under Title VII); *see also Kimzey v. Wal-Mart Stores, Inc.*,107 F.3d 568, 576 (8th Cir. 1997) (management's practice of turning a blind eye to repeated complaints of misconduct was sufficient to demonstrate "reckless indifference.").

IV. The Defendant City Is Liable for the Sexual Harassment by its Police Chief and Officers, Because it Permitted, Tolerated and Condoned a Custom or Pattern of Discriminatory Conduct.

The City did not have a policy against sexual harassment, or a complaint procedure, until July 12, 2000 when it distributed the policy. More troubling is the

fact that the officers' conduct to whom it was specifically designed to curtail did not even sign the acknowledgements months and, in the Police Chief's case, until 2002. This is disgraceful.

Moreover, even if the policy can be considered some type of an official city policy, ". . . the existence of written policies of a defendant is of no moment in the face of evidence that such policies are neither followed nor enforced." *Ware v. Jackson County, Missouri*, 150 F.3d 873, 882 (8th Cir. 1998) (*citing City of St. Louis v. Praprotnik*, 485 U.S. 112, 131 (1988). Here, the evidence is overwhelming that the policy of the City was not followed but rather, openly flouted. Indeed, the officers did not even sign a form acknowledging receipt of the policy until months and, in the Chief's case, years later. Mrs. Davison simply could not get the officers to sign the acknowledgment. Some were found in the trash. Does this show the policy was respected?

In the words of its own City Attorney, the alleged conduct of the officers was "persistent" and that the City had **"no mechanism"** with which to address the problems of Mrs. Davison. (DSA 171, Gatrost Deposition, p.p.47-48). On July 12, 2000, the City distributed a memo to all city employees indicating that they were required to acknowledge receipt of the City's sexual harassment policy. (DSA 313, Reinking Deposition, p.19; DSA 333, Reinking Deposition Exhibit 5). On December 8, 2000, Officer Derrick Ross signed the acknowledgement

indicating receipt of the City's sexual harassment policy. (DSA 314, Reinking Deposition, p.p.23-24; DSA 334, Reinking Deposition Exhibit 8). On March 4, 2002, Officer Jeff Jewell signed the acknowledgement indicating receipt of the City's sexual harassment policy. (DSA 314, Reinking Deposition; DSA 335, Reinking Deposition Exhibit 6).

The City did nothing with regard to remedying the concerns of Ms. Davison. It never investigated her concerns though the City had prior similar complaints from a former City Clerk. The Board of Alderman did not investigate the concerns and simply had an attitude "this is the way it is." (DSA 171, Gatrost Deposition, p.p.46-47). Gatrost characterizes the alleged conduct of the officers as "persistent" and admits that the City had "no mechanism" with which to address the problems of Ms. Davison. (DSA 171, Gatrost Deposition, p.p.47-48). Reinking is unaware of any investigation taken by the City into the complaints of Ms. Davison regarding sexual harassment. (DSA 317, Reinking Deposition, p.p.33).

There was a feeling that nothing could be done to remedy the complaints of Ms. Davison. The problems would generally be solved by the employee quitting and the City hiring someone who was not offended by the conduct. (DSA 169, Gatrost Deposition, p.p.38-39). The Board of Alderman and the Mayor were aware of Ms. Davison's concerns and complaints. (DSA 169, Gatrost Deposition,

p.p.40). Though the City had a duty to investigate Ms. Davison's complaints and both Mr. Gatrost and the Mayor believed that Ms. Davison was credible and that officers Jewell, Ross, and Berry had referred to women as cunts, sluts, whores, and bitches because "there was just too much that was bombarding us on almost a daily basis", no investigation was undertaken. (DSA 170, Gatrost Deposition, p.p.42-43)

Here, viewed in the light most favorable to Mrs. Davison, the evidence shows that she endured repeated incidents of sexual harassment, in the form of verbal abuse to women in the year 2000. By itself, this is sufficient to establish a continuing, widespread, persistent pattern of unconstitutional conduct. *See Ware, supra*, 150 F.3d at 881-882.

VI. The Defendant City Was Deliberately Indifferent to a Substantial Risk of Harm

In *Ware, supra*, the court held that the plaintiff had established deliberate indifference so as to hold the municipality responsible under §1983. *Id.* at 882-885. In *Ware*, the defendant Jackson County Jail contended that it had a policy and custom of investigating complaints of sexual harassment, and enforcing its policy against sexual misconduct. Here, in contrast, defendant City had no policy against sexual harassment until weeks into Davison' employment, despite the fact that it was common knowledge that sexual harassment is a potential problem in nearly all American workplaces. (*See Faragher, supra*, 118 S.Ct. at 2288

("[E]veryone knows by now that sexual harassment is a common problem in the American workplace."). More concretely, the City knew that sexual harassment was occurring because of the frequent complaints it had received from Mrs. Davison and its own city attorney, Michael Gatrost. *See Ware,* 150 F.3d at 883 (deliberate indifference shown if risk of harm was obvious); *see Harris v. City of Pagedale,* 821 F.2d, 499, 506 (8th Cir. 1987) (finding deliberate indifference where city officials were notified on "repeated occasions" of employee misconduct but "repeatedly failed to take any remedial action"); see *Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir.1996) (holding that Chief of Police's awareness of two complaints of misconduct against an officer and Chief's statement that he "wouldn't doubt" that officer committed an offense were sufficient to prove Chief was deliberately indifferent to victim's rights); *see also Nicks v. State of Mo.*, 67 F.3d 699, 702-03 (8th Cir. 1995).

As in *Ware,* and *Harris,* the necessary causal link is supplied by defendant's knowledge and failure to supervise or monitor to prevent further misconduct by Chief Jewell and the defendant officers. As the court stated in Ware:

> In *Harris v. City of Pagedale,* we held that, where it becomes clear that an employee or group of employees needs close and continuing supervision and "the municipality fails to provide such supervision, the inevitable result is a continuation of the misconduct." 821 F.2d 499, 508 (8th Cir.1987) (internal quotation omitted)".

Ware, supra, 150 F.3d at 885. Needless to say, Chief Jewell and his subordinates needed close and continuing supervision, which defendant utterly failed to provide. Additional evidence of deliberate indifference also exists. Despite repeated complaints, defendant never even *investigated* the allegations of sexual misconduct. S*ee Vineyard v. County of Murray*, 990 F.2d 1207, 1212 (11th Cir. 1993) (failure to investigate the incident in question relied upon as evidence of policy of deliberate indifference).

VII. Mrs. Davison's Claim for Constructive Discharge Should be Decided by a Jury.

"If an employee quits because she reasonably believes there is no chance for fair treatment, there has been a constructive discharge." *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 574 (8th Cir. 1997).

See Jaros v. Lodgenet Entertainment Corp., 294 F.3d 960, 965-66 (8th Cir. 2002) (jury was entitled to find that defendant's response to her claim was inadequate and ineffective, and that she quit only after giving it a reasonable chance to work out the problem); *see also Van Steenburgh*, 171 F.3d at 1160-61 (resignation after years of complaints of sexual harassment supported verdict for constructive discharge).

Mrs. Davison gave the City more than a fair chance to resolve the problem. It instituted a policy against harassment only to have that policy found in the trash and not even signed by some of the officers. In the words of its own City

Attorney, there was a feeling that nothing could be done to remedy the complaints of Ms. Davison. The problems would generally be solved by the employee quitting and the City hiring someone who was not offended by the conduct. (DSA 169, Gatrost Deposition, p.p.38-39).

CONCLUSION

For the foregoing reasons, Davison respectfully submits that the Order of the District Court be reversed.

Respectfully Submitted,

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The undersigned hereby certifies that this brief was prepared on a computer, using Microsoft Word. A diskette containing the full text of the brief is provided herewith, and has been scanned for viruses and is believed to be virus-free.

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ATTORNEY FOR APPELLANT

APPELLANT'S CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief herein is in compliance with Federal Rule of Appellate Procedure 32(a)(7)(B). According to the word count of the word processing system used to prepare the brief, the brief contains 9401 words.

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ATTORNEY FOR APPELLANT

ADDENDUM